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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JANET LEE SIMS,

Defendant and Appellant.

H034345

(Monterey County
Super.Ct.Nos. SS080915A &
SS082158A)

Defendant Janet Lee Sims was convicted by no-contest plea of commercial burglary in violation of Penal Code section 459¹ in exchange for a negotiated disposition of felony probation. While on probation, she was convicted by plea of petty theft in violation of sections 484, subdivision (a) and 666 with a prior conviction, and she admitted that this new offense constituted a probation violation, both in exchange for a promise of reinstatement of felony probation, but with the understanding that she would be kept in custody until she could be placed in a long term drug-treatment program after serving 150 days of a 365-day jail sentence. After being placed in a drug-treatment program, defendant was later charged in both cases with violating probation after her unauthorized early departure from the program. She admitted the violation and was sentenced to state prison for the upper term of three years for the petty theft with a prior

¹ Further statutory references are to the Penal Code unless otherwise stated.

conviction. The court also imposed a concurrent two-year term for the commercial burglary conviction. Defendant appeals and we affirm.

STATEMENT OF THE CASE

On February 16, 2008, defendant, while on probation for four prior theft-related convictions, was caught by a loss prevention employee at Save Mart, having shoplifted \$479.85 worth of meat and flowers. She had loaded the items into a cart and then left the store but was detained in the parking lot. Police arrived and arrested defendant. They found a crack pipe in her purse and confiscated it. Defendant told the officers that she was addicted to smoking cocaine and that she had stolen the items at Save Mart so she could sell them for cash to buy drugs.

Defendant was charged by complaint with second degree burglary in violation of section 459 (count 1) and grand theft in violation of section 487, subdivision (a) (count 2) (case no. SS080915A). She later waived her rights and pleaded no contest to burglary in exchange for a negotiated disposition. The court found a factual basis for her plea based on her oral admission that she had taken items from Save Mart without paying for them. The court later suspended sentence and placed defendant on formal probation for three years with terms and conditions, ordered her to serve a jail term of 180 days with credit for time served, and dismissed the remaining count. With respect to two of the four prior convictions, the court revoked probation and reinstated it on the same terms and conditions. With respect to the other two priors, the court revoked and terminated probation, deeming sentence satisfied by credit for time served.

Defendant was apparently released from jail in June 2008. On August 14, 2008, she was observed two different times that day stealing food and clothing from Pilot Travel Center. Defendant was arrested and she admitted to police that she had stolen two t-shirts. She said that she had started using drugs immediately after being released from jail.

Defendant was charged by complaint with petty theft with four priors in violation of sections 484, subdivision (a)/666 (count 1) and commercial burglary in violation of section 459 (count 2) (case no. SS082158A). She was also charged with violating probation by reason of the offense. She later pleaded guilty to petty theft on the condition that she be placed on probation and the court found a factual basis for the plea based on her admission that she had stolen the two t-shirts. She also admitted to having violated probation.

The court suspended imposition of sentence, and on September 26, 2008, placed defendant on formal probation for three years with terms and conditions, directed that she serve 365 days in county jail, with credit for time served, but authorized her to be released to a residential drug treatment program after serving 150 days. The court also revoked and reinstated probation on the same terms in the prior case (case no. SS080915A), as well as in other cases for which she was also on probation at the time of the petty theft offense. The remaining burglary charge was dismissed.

On March 9, 2009, a probation-violation petition was filed in both cases alleging that defendant had “departed the Delancey Street Foundation Residential Treatment Program on March 4, 2009. The defendant did not have permission from program staff, or the Probation Department, to leave the program prior to completion.” Defendant was later arrested and admitted the violation in both cases. The court denied probation and sentenced her to state prison for the upper term of three years for the petty theft conviction. The reasons given for imposition of the upper term were that defendant’s prior convictions were numerous, her offenses were increasing in seriousness, she had served prior prison terms, and she was on two separate grants of probation when she committed the crime. For the commercial burglary conviction, the court sentenced defendant to the middle term of two years, to be served concurrently. Previously imposed but suspended restitution fines of \$200 under section 1202.4, subdivision (b)

were imposed in each case and fines in the same amount were imposed but suspended under section 1202.45. The court awarded credits in the amount of 176 days as to the petty theft conviction and 330 days as to the burglary conviction. The court also ordered that defendant be considered by the Department of Corrections and Rehabilitation for placement in a substance abuse program under section 1203.096, subdivision (a).

Defendant timely filed a notice of appeal, specifying two bases of alleged sentencing error: 1) The court “imposed the upper term of 3 years [for the petty theft conviction] and made this case the principal term because . . . it had the least amount of conduct credits (118 + 58) or 176 days credit instead of making [the burglary conviction] the principal term (213 + 106) or 330 days credit”, resulting in defendant having to serve more time in prison; and 2) the court “ignored the defendant’s request to run the subordinate term [for the burglary conviction] consecutive to the principal term [for the petty theft conviction] despite the fact the criminal acts occurred at different times in different ways and under the California Rules of Court should not have been run concurrent. [The court] did not articulate on the record [its] reasons for running the terms concurrent By running the subordinate term concurrent, the defendant will have to serve more time in state prison.”

DISCUSSION

We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief that stated the case and the facts but raised no specific issues and requested this court to conduct an independent review under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We notified defendant of her right to submit written argument on her own behalf within 30 days. This period has elapsed and we have received no written argument from defendant.

We have reviewed the entire record under *Wende* and *People v. Kelly* (2006) 40 Cal.4th 106. Based upon this review, we have concluded that there is no arguable issue

on appeal. We do note the issues raised in defendant's notice of appeal and observe that her briefing does not pursue them. Because the court imposed concurrent rather than consecutive terms, it did not select either term as principle or subordinate. And rule 4.406(b) of the California Rules of Court does not require the court to state its reasons for imposing concurrent as opposed to consecutive terms. Accordingly, these issues are not arguable on appeal.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P.J.

Elia, J.